

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 1, 2009

IN RE: CONSERVATORSHIP OF JOHN DANIEL TATE

**Circuit Court for Davidson County
No. 07P-1654**

No. M2009-02174-COA-R10-CV - Filed December 15, 2009

This Tenn. R. App. P. 10 application for an extraordinary appeal concerns whether the trial court has entered a final judgment in a conservatorship proceeding. The trial court entered a series of orders in late 2007 and early 2008, regarding the appointment of a temporary conservator. More than a year later, the ward filed a motion requesting the entry of a final judgment so that he could file an appeal as of right. On September 22, 2009, the trial court denied the motion for entry of a final judgment, holding that its prior orders were final orders. We have concluded that the trial court's prior orders were interlocutory in nature and did not constitute final judgments. Accordingly, we grant the ward's application, reverse the trial court's September 22, 2009 decision and remand the case to the trial court for entry of a final judgment.¹

**Tenn. R. App. P. 10 Application for Extraordinary Appeal; Judgment of the Circuit Court
Vacated and Remanded**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Michael G. Hoskins, Nashville, Tennessee, for the appellant, John Daniel Tate.

Paul T. Housch, Nashville, Tennessee, for the appellee, David E. Tate.

OPINION

PROCEEDINGS IN THE TRIAL COURT

On October 19, 2007, David E. Tate filed a Petition for the Appointment of Conservator in the Circuit Court for Davidson County. David E. Tate alleged that his brother, John Daniel Tate, suffered from a life threatening substance abuse condition and was in need of a conservator to make

¹Pursuant to Tenn. R. App. P. 2, we suspend the application of Tenn. R. App. P. 24, 25 and 29, and find oral argument to be unnecessary pursuant to Tenn. R. App. P. 35(c). See *Hammock v. Sumner Co.*, No. 01A01-9710-CV-00600, 1997 WL 749461 (Tenn. Ct. App. Dec. 5, 1997) (No Tenn. R. App. P. 11 application filed).

all financial, personal and medical decisions. The trial court conducted an ex parte emergency hearing on October 23, 2007. On the same date, the trial court entered an order appointing David E. Tate (hereinafter “the temporary conservator”) as temporary conservator for the person and property of John Daniel Tate (hereinafter “the ward”). The order provided that the rights of the ward under Tenn. Code Ann. § 34-3-104(8) and 106 were preserved pending the final hearing. The trial court also appointed a guardian ad litem, directed a medical examination of the ward, and a set a hearing on the petition for November 14, 2007. The petition, the October 23, 2007 orders and the notice of November 14, 2007 hearing were served on the ward on November 2, 2007.

Both the guardian ad litem, Robert H. Stratton, and court appointed psychiatrist, Dr. William Kenner, filed reports with the trial court indicating that the ward was in need of a conservator. On November 14, 2007, the trial court held a “full blown hearing” on the Petition for Appointment of Conservator. Following the hearing, the trial court entered an order finding the ward to be a disabled person pursuant to Tenn. Code Ann. § 34-1-101(7) and appointing David E. Tate as conservator. It is important to note, however, that the trial court changed the term “Conservator” to “Temporary Conservator” throughout most of the proposed order submitted by the temporary conservator. Moreover, the trial court deleted the provision in the proposed order providing that the letters of temporary conservatorship “are hereby dissolved, as the court has appointed a full time conservator.” Instead, the trial court substituted language providing that the letters of temporary conservatorship “shall remain in effect pending further orders of the court.” On the same date, the trial court entered a supplemental order appointing the ward an attorney ad litem, ordering the ward to be admitted to Vanderbilt University Medical Center for treatment, and setting a review hearing for December 11, 2007, “to determine if the Temporary Conservator shall be made a Full Time Conservator and whether the conservatorship should continue based on the medical need of the Respondent John Daniel Tate.” The supplemental November 14, 2007 order refers to the original November 14, 2007 order as the “Order Appointing a Temporary Conservator.”

On November 30, 2007, the ward filed a Motion to Remove or Replace the Temporary Conservator. The ward subsequently filed an Answer to the Petition for the Appointment of a Conservator on December 10, 2007. The following day, the trial court conducted a hearing on the Motion to Remove or Replace the Conservator. On December 13, 2007, the trial court found that the “temporary conservatorship” should remain in effect and denied the Motion to Remove or Replace the Conservator. The trial court also ordered the ward to continue treatment and set a status review hearing for January 7, 2008. The order provided that the ward would be permitted to present proof regarding his treatment and whether any further treatment would be necessary “pending the Final Hearing in this cause.”

The ward filed a Second Motion to Remove or Replace Conservator on January 3, 2008. On January 7, 2008, the trial court held a hearing on the Second Motion to Remove or Replace Conservator and “to determine if any further medical treatment or programs” were necessary “pending a final hearing in this cause.” On January 14, 2008, the trial court entered an order declining to remove the temporary conservator, requiring further treatment, and setting a status review hearing for April 22, 2008. When the ward failed to seek treatment as ordered, the trial court

entered an Emergency Order on January 17, 2008, ordering the ward to be immediately transported to Vanderbilt University Medical Center.

The April 22, 2008 status review hearing apparently never took place; at least, there is no record of a hearing. In June of 2009, the temporary conservator filed a Motion for Body Attachment asserting that the ward had failed to comply with the trial court's orders regarding treatment and drug testing. The trial court issued the attachment on June 30, 2009. The trial court approved a plan of treatment on a temporary basis on July 24, 2009. On August 14, 2009, the trial court entered an order making the plan of treatment permanent "pending further orders of the court" and setting a status conference for August 28, 2009.

On August 28, 2009, the ward filed a Motion for Entry of a Final Judgment requesting that the trial court enter a final judgment so that the ward could file an appeal. The trial court denied the Motion for Entry of Final Judgment on September 22, 2009. The trial court held that no motion to alter or amend, motion for new trial or notice of appeal had been filed regarding the November 14, 2007 order, the December 11, 2007 order or the January 7, 2008 order, and that those orders were thus deemed final. The ward responded by filing this application as well as a Tenn. R. App. P. 3 notice of appeal. Pursuant to Tenn. R. App. P. 10(d) and this court's October 29, 2009 order, the temporary conservator has filed an answer in opposition to the application.

ISSUES

The ward asserts the trial court erred in denying his Motion for Entry of a Final Judgment and thus divested him of his statutory right to appeal. In addition, the ward raises several issues regarding the merits of the trial court's orders from 2007 and 2008. We grant this extraordinary appeal solely to address the finality of the trial court's orders and the ward's right to have a final judgment entered from which he may file an appeal as of right. We do not address the issues raised by the ward concerning the merits of the trial court's decisions regarding the conservatorship. Those issues must be raised in any Tenn. R. App. P. 3 appeal as of right which may be filed after a final judgment is entered.

ANALYSIS

A final judgment is a judgment that resolves all the claims between all the parties, "leaving nothing else for the trial court to do." *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997). An order that adjudicates fewer than all the claims between all the parties is subject to revision any time before the entry of a final judgment and is not appealable as of right. Tenn. R. App. P. 3(a); *King v. Spain*, No. M2006-02178-COA-R3-CV, 2007 WL 3202757 at *8 (Tenn. Ct. App. October 31, 2007).

Our review of the November 14, 2007, December 11, 2007, and January 7, 2008 orders leads to the inevitable conclusion that none of the three orders constitutes a final judgment. Each order specifically refers to the conservator as "temporary"; each order grants relief only "pending" a

further hearing; and each order specifically contemplates and discusses a “final hearing” to be held sometime in the future. The November 14, 2007 order set a future review hearing “to determine if the Temporary Conservator shall be made a Full Time Conservator.” The December 13, 2007 order set a future hearing to determine whether any further treatment would be necessary “pending the Final Hearing in this cause.” The January 7, 2008 order states that it was to determine if further medical treatment was necessary “pending a final hearing in this cause.” None of these orders can be read as a final decision on the Petition for Appointment of Conservator.

The respondent (ward) in a conservatorship action has the right to appeal “the final decision on the petition.” Tenn. Code Ann. § 34-3-106(3). That right cannot be deprived by the entry of one or more interlocutory orders that are intended to be temporary decisions pending a final hearing on the petition to appoint a conservator. The trial court in this case has not yet entered a final decision on the petition; rather, each order was interlocutory, granting temporary relief pending further review, and each order expressly contemplated a final hearing in the future on the petition to appoint a conservator. While we understand the trial court had good reasons for entering temporary orders, the ward was entitled to have a reasonably prompt final hearing² and the entry of a final judgment from which he can file an appeal as of right pursuant to Tenn. R. App. P. 3 and Tenn. Code Ann. § 34-3-106(3).³

POST-JUDGMENT FACTS

The ward has also filed a motion asking this court to consider a video affidavit and four negative drug screens as post-judgment facts pursuant to Tenn. R. App. P. 14. Consideration of post-judgment facts is contemplated only when those facts occur after the judgment appealed, are unrelated to the merits and are not genuinely disputed. Tenn. R. App. P. 14, *Advisory Commission Comments*. Tenn. R. App. P. 14 does not permit a party to relitigate disputed issues by placing before the appellate court evidence not heard by the trial court. *Duncan v. Duncan*, 672 S.W.2d 765, 768 (Tenn. 1984). In any event, the facts submitted by the appellant are not relevant to our decision

² How soon a final hearing on a petition to appoint a conservator may be held is dependent upon the totality of circumstances of each particular case.

³ It should be noted that all conservatorships are “temporary” in certain respects as the ward, also identified as the “disabled party” in the statute, is entitled to a modification of a final order creating a conservatorship and/or the termination of the conservatorship if and when it appears the conservatorship is no longer necessary for the assistance, protection or supervision of the ward. *See* Tenn. Code Ann. § 34-3-108(a). The termination or modification of a conservatorship is not uncommon; this often occurs when the conservatorship was created due to the respondent suffering a stroke or head trauma, which necessitated the conservatorship, from which the ward thereafter sufficiently recovers to attend to his/her own affairs, in whole or in part. Tenn. Code Ann. § 34-3-108(a) provides in pertinent part: “A conservator appointed under this chapter may be discharged or have its duties modified if the court determines that the respondent is no longer a disabled person, or that it is in the best interests of the disabled person that the conservatorship be terminated, . . .” The procedure for modification or termination of a conservatorship is set forth in Tenn. Code Ann. § 34-3-108(b).

regarding the finality of the trial court's orders. The motion to consider post-judgment facts is therefore denied.

IN CONCLUSION

The Tenn. R. App. P. 10 application for an extraordinary appeal is hereby granted. The trial court's September 22, 2009 order is vacated, and the case is remanded to the trial court for entry of a final judgment on the Petition for Appointment of Conservator from which the appellant will be entitled to file an appeal as of right. The costs are taxed to appellee for which execution may issue.

FRANK G. CLEMENT JR., JUDGE